MOTION FILED
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No. 97-1958

In the

Supreme Court of the United States

October Term, 1997

SMALL LANDOWNERS OF OAHU, *et al.*,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pacific Legal Foundation (PLF) respectfully submits this motion for leave to file the annexed brief amicus curiae pursuant to Supreme Court Rule No. 37.[1] Consent to the filing of this brief has been granted by counsel for petitioners Small Landowners of Oahu and Richard S. H. Wong, *et al.*, Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate, and has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondent City and County of Honolulu.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. With over 25,000 members and contributors nationwide, PLF is the largest and most experienced public interest law foundation supporting mainstream Americans who believe in limited government, free enterprise, and individual freedom. PLF's policies are set by a volunteer Board of Trustees, who authorize the filing of amicus briefs when such participation may be of assistance to the Court.

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint regarding the underlying constitutional issues in this case. PLF has participated in numerous cases before this Court involving the protection of rights guaranteed by the Takings Clause of the Fifth Amendment. PLF attorneys were counsel of record in

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Nollan v. California Coastal Commission[2] and *Suitum v. Tahoe Regional Planning Agency*,[3] and participated as amicus curiae in *Hawaii Housing Authority v. Midkiff*,[4] *Agins v. City of Tiburon*,[5] *Keystone Bituminous Coal Association v. DeBenedictis*,[6] *Hodel v. Irving*,[7] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[8] *Lucas v. South Carolina Coastal Council*,[9] *Dolan v. City of Tigard*,[10] and *Babbitt v. Youpee*.[11]

In *Hawaii Housing Authority v. Midkiff*, this Court established an extremely deferential standard for reviewing determinations of "public use" by state legislatures under the Takings Clause of the Fifth Amendment. However, this Court did not intend that such determinations should receive no effective judicial review whatsoever. Moreover, the reasoning of *Midkiff*, supporting deference to the public use determinations of *state* legislative bodies, does not apply to the corresponding findings of *local* governments such as the City and County of Honolulu. This case involves an egregious abuse of the power of

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[2] 483 U.S. 825 (1987).

[3] 117 S. Ct. 1659 (1997).

[4] 467 U.S. 229 (1984).

[5] 447 U.S. 255 (1980).

[6] 480 U.S. 470 (1987).

[7] 481 U.S. 704 (1987).

[8] 482 U.S. 304 (1987).

[9] 505 U.S. 1003 (1992).

[10] 512 U.S. 374 (1994).

[11] 117 S. Ct. 29 (1997).

eminent domain by a local government, authorizing the forced transfer of private property from one private owner to another with no use of public funds, pursuant to a "public use" rationale that can best be regarded as an impossibility. Under these circumstances, this amicus will argue that *Midkiff's* deference should not apply and the ordinance at issue in this case should be struck down as a purely private taking, in violation of the Fifth Amendment.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: June, 1998.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether deferential, rational-basis review is appropriate for all compensated takings of private property, even when the taking does not alter the use of the property or produce any social surplus; the lawmaking body at issue is a local, rather than a state, government; and the compensation is provided not from public funds but from the private parties for whose benefit the expropriation is occurring.

2. Whether this Court's decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), should be limited to the extent it suggests that deferential, rational-basis review is appropriate for all compensated takings of private property.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES CITED iv

INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 3

I. THE CITY AND COUNTY OF HONOLULU ORDINANCE 91-95 EXCEEDS THE PUBLIC PURPOSE STANDARD ESTABLISHED IN *MIDKIFF* AND IS AN UNCONSTITUTIONAL TAKING OF PROPERTY FOR A PRIVATE PURPOSE 3

A. The Standard Established in *Midkiff*, While Broad, Is Not Without Limit 4

B. The Public Purpose in the City's Ordinance Is Virtually the Same as That in the State's Land Reform Act 6

C. After the Economic Development Following *Midkiff*, No Legislative Body Could Conceivably or Reasonably Believe That Such an Ordinance Could Possibly Effectuate Its Stated Goal 6

Page

D. City Ordinance 91-95 Results in an Unconstitutional Taking of Property Contrary to the Public Purpose Clause of the Fifth Amendment 8

II. IT IS UNWARRANTED AND IMPROPER TO EXTEND TO LOCAL GOVERNMENT THE DEFERENTIAL STANDARD OF REVIEW WHICH THE COURT EXTENDED TO STATE LEGISLATURES IN *HAWAII HOUSING AUTHORITY v. MIDKIFF* 12

A. Presumptions in Favor of State Legislatures Ought Not and Do Not Extend to City Councils 12

B. This Court Has Twice Previously Used a Less Deferential Standard in Reviewing Local Government Declarations of Public Purpose in Eminent Domain Cases 15

CONCLUSION 18

TABLE OF AUTHORITIES CITED

Page

Cases

Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Board of Lawrence, 531 N.E.2d 1233 (1988) 9-10

City of Bellevue v. Painter, 795 P.2d 174 (Wash. App. 1990) 10

City of Center Line v. Chmelko, 416 N.W.2d 401 (Mich. App. 1987) 16

City of Cincinnati v. Vester, 281 U.S. 439 (1930) 5, 11, 15, 17

City of Lansing v. Edward Rose Realty Inc., 502 N.W.2d 638 (Mich. 1993) 16-17

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City of Oakland v. Oakland Raiders, 203 Cal. App. 3d 78 (1988) 10

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City of Wheaton v. Sandberg, 574 N.E.2d 697 (App. Ill. 1991) 17

Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982) 12

Condemnation of .036 Acres, More or Less, of Land Owned by Wexford Plaza Associates, 674 A.2d 1204 (Pa. 1996) 10

Page

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Dolan v. City of Tigard, 512 U.S. 374 (1994) 8-9, 12, 14

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Eastern Enterprises v. Apfel, 1998 WL 332966, at *39 (U.S. Sup. Ct. June 25, 1998) 1

Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896) 5

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Gomillion v. Lightfoot, 364 U.S. 339 (1960) 13

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Kessler v. City of Indianapolis, 157 N.E. 547 (Ind. 1927) 17

Laurence v. Stonewall, 503 So. 2d 260 (Miss. 1987) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 9, 12

Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239 (1905) 5

Page

New Jersey Housing and Mortgage Finance Agency v. Moses, 521 A.2d 1307 (N.J. 1987) 9

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 12

Old Dominion Co. v. United States, 269 U.S. 55 (1925) 4

Olson v. Whitpain Township, 595 A.2d 706 (Pa. 1991) 11

Public Service Co. of Oklahoma v. B. Willis, C.P.A., Inc., 941 P.2d 995 (Okl. 1997) 11

Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) 8

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Roberts v. City of Worcester, 635 N.E.2d 1365 (Mass. 1994) 9

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937) 5

United States v. Carolene Products Co., 304 U.S. 144 (1938) 15

United States v. Gettysburg Electric Railroad Co., 160 U.S. 668 (1896) 4-5

United States Constitution

First Amendment 14

Fourth Amendment 14

Fifth Amendment 3, 8, 11, 14, 18

Page

Miscellaneous

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Page

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

> [T]he Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another.

Eastern Enterprises v. Apfel, 1998 WL 332966, at *39 (U.S. Sup. Ct. June 25, 1998) (Kennedy, J., concurring in the judgment and dissenting in part).

INTERESTS OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation.

STATEMENT OF THE CASE

This case is about a governmental taking of property from one class of private owners in order to transfer it to another, larger class of private owners, devoid of a constitutionally required public purpose. Relying on an overbroad reading of this Court's 1984 decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, the court below upheld the City and County of Honolulu's use of its eminent domain power to force owners of land under condominium apartment buildings to transfer their land to the condominium apartment owners.

As appears in Section I below, the alleged public purpose advanced for the measure in question--Honolulu's Ordinance 91-95--masks a simple transfer of ownership from a comparatively powerless group of mostly small landowners to a comparatively large and politically powerful group of apartment owners. The declaration of public purpose contained in Ordinance 91-95 is, in most important respects, identical to that of Hawaii's Land Reform Act of 1967, upheld by this Court in *Midkiff*. However, in contrast to the public purpose rationale underlying the Land Reform Act, in the case at bar there is no

oligopoly of landowners and no threat to the local economy that can conceivably be eliminated by Ordinance 91-95. Moreover, events that have transpired since *Midkiff* have shown that none of the public benefits ostensibly sought by the Land Reform Act in fact ensued. Therefore, what was at least arguably a legitimate public purpose for the Land Reform Act is simply not a conceivable public purpose for Ordinance 91-95. Indeed, the public purpose rationale recited to justify Ordinance 91-95 is an impossibility.

Over the past 35 years, many small landowners made available to developers of condominium apartment buildings their fractional fee simple interest in their land. These arrangements represented investments for most of these small landowners, many of whom have held these lands for generations. Those who chose to purchase leasehold condominiums in these buildings knew that their ground rents were subject to change at certain times and, depending upon the market, that the change would result in an increase in rent. Those that chose not to take such a risk purchased condominiums on land held in fee simple by a condominium owners' association, with no ground rent.

Land in Hawaii increased in value during most of this 35-year period because of both the desirability of living in Hawaii and the scarcity of land available for urban development. Under Hawaii's statewide zoning law, less than 4% of the land area of the entire state is classified for urban use.[1]

Faced with increasing land values and concomitant ground rent increases, disgruntled condominium owners commenced a campaign for legislative relief to force ground lessors to sell their land to them. The condominium owners first targeted the broadly representative Hawaii State Legislature which had enacted the Land Reform Act of 1967, upheld by this Court in

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[1] *See* David L. Callies, *Regulating Paradise: Land Use Controls in Hawaii* 7 (U. of Hi. Press, 1984).

Midkiff. However, the condominium owners repeatedly failed to achieve their goal of acquiring the property of their landlords. Studies commissioned by the legislature uniformly found that the condition and situation of these lessees, and the market facts of life of which they complained, were not remotely similar to the conditions that justified passage of the Land Reform Act.

Rebuffed by the state, the condominium owners ultimately persuaded the City Council of Honolulu (by a narrow 5-4 margin) to pass a bill that was so obviously and transparently designed to strip the rights of one class of landowners in order to benefit another class that the mayor of the city refused to sign the bill which eventually became Ordinance 91-95. Under Ordinance 91-95, the city bears no financial burden of compensation whatsoever. Compensation--even the city's overhead and administrative costs allocable to the condemnations--is paid by the proud new owners of their former landlord's property.

This Court cannot and must not tolerate such an abuse of its *Midkiff* decision. When local government uses its eminent domain power to take real property from A in order to give it to B without any meaningful impact on anyone else or the community at large, the taking is purely private and must surely violate the Public Use Clause of the United States Constitution's Fifth Amendment.

REASONS FOR GRANTING THE PETITION

I

THE CITY AND COUNTY OF HONOLULU ORDINANCE 91-95 EXCEEDS THE PUBLIC PURPOSE STANDARD ESTABLISHED IN *MIDKIFF* AND IS AN UNCONSTITUTIONAL TAKING OF PROPERTY FOR A PRIVATE PURPOSE

The city's condominium fee conversion ordinance's public purpose goes beyond what is permissible under the United States Supreme Court's broad standard set in *Hawaii Housing*

Authority v. Midkiff. While broad, the *Midkiff* standard has limits. The public purpose must be conceivable and with a rational foundation. In 1967, the Hawaii State Legislature "conceivably" thought that Hawaii's Land Reform Act could serve the public purpose of breaking up an oligopoly in fee simple ownership of single-family residential housing and that such a break-up would lower the price of single-family housing in Hawaii. As appears below, however, neither happened. As the Ninth Circuit states in its opinion, the city's ordinance is identical in many respects to the Land Reform Act upheld by this Court in *Midkiff*. A reading of the ordinance reveals that in most important respects it is the same. It necessarily follows that the public purposes are the same. Confronted with a public purpose that utterly failed to materialize after *Midkiff*, the City Council's virtually identical public purpose must surely be characterized as not only unreasonable but a virtual impossibility. Because it is based upon an inconceivable public purpose, Ordinance 91-95 is, therefore, unconstitutional.

A. The Standard Established in *Midkiff*, While Broad, Is Not Without Limit

The standards set by this Court in reviewing a legislature's judgment of what constitutes a public use is broad and deferential:

> [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

467 U.S. at 241. Indeed, the Court quoted with approval from earlier cases holding that "deference to the legislature's 'public use' determination is required 'until it be shown to involve an impossibility[,]'" (*see Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)) and that the Court will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Electric Railroad Co.*,

160 U.S. 668, 680 (1896). Nevertheless, this Court made it crystal clear in *Midkiff* that:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power.

467 U.S. at 240. Although this Court noted that a court's role is an extremely narrow one, it nevertheless cited with approval cases in which this Court has "repeatedly stated that '*one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.*'" *Midkiff*, 467 U.S. at 241 (citing *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (challenging a gas proration order by state railroad commission) (emphasis added)); *see also City of Cincinnati v. Vester*, 281 U.S. 439 (1930) (challenging excess condemnation by city for road widening); *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239 (1905) (challenging traction company's condemnation of private land); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896) (challenging condemnation/land sale by judgment collector for San Diego County).

The City and County of Honolulu has gone well beyond what this Court envisioned in *Midkiff*. The city's ordinance is a naked transfer of property from one (small) group of private persons--a heterogeneous assemblage of lessors--for the benefit of another (much larger) group of private persons--lessees of apartments held as condominiums. On the facts of this case, the city could not possibly have reasonably believed that this transfer was related to the public purposes set out in the following section. This inter-private transfer is, beyond simple recitation of a public purpose mantra, without any palpable foundation. The avowed public purpose is, on the facts, an impossibility. Furthermore, "[w]hen a statute authorizes a single taking for uses both public and private [without limiting the taking to public use] such that private use cannot be disregarded and the uses are so

commingled that they cannot be separated, then the whole statute authorizing the taking is unconstitutional." 2A Julius L. Sackman, *Nichols on Eminent Domain* § 7.03[5][d] (Revised 3rd ed., 1997).

B. The Public Purpose in the City's Ordinance Is Virtually the Same as That in the State's Land Reform Act

Except for some tautological references in the city ordinance to landowners owning virtually all the land under condominiums, the purposes set out in the Honolulu Ordinance and the Hawaii Land Reform Statute are virtually the same. Both inveigh against an alleged shortage of fee simple land for residential purposes. Both blame such alleged shortage for high home prices. Both claim such high home prices are economically disruptive. Both blame landowner-lessees for the alleged shortage and alleged lack of choice between leased and fee simple land underneath condominium apartments and single-family residences. Both allege the existence of an oligopoly. Finally, both declare that it is necessary to condemn the land of the lessors and convey it to the lessees in order to remedy these alleged problems and abuses.

Even if all the above are accurately stated and are of public concern and consequence, it is nevertheless inconceivable that Honolulu's City Council could have reasonably believed the condemnation of lessor-landowner's land would provide a solution.

C. After the Economic Development Following *Midkiff*, No Legislative Body Could Conceivably or Reasonably Believe That Such an Ordinance Could Possibly Effectuate Its Stated Goal

Three decades have passed since Hawaii enacted its Land Reform Act, and 14 years have passed since this Court decided *Midkiff*. The evidence is overwhelming that the State's Land

Reform Act utterly failed to serve its articulated public purposes. As noted by the Director of the University of Hawaii's Hawaii Real Estate Center, instead of falling, prices escalated after the *Midkiff* decision.[2] A 1993 study by the University's Department of Economics reached the same conclusion.[3] Indeed, the price of fee simple single-family homes vastly exceeds the price of such homes on leased lots, and the rise in land values generally continues unabated.[4]

It is clear, both from the aftermath of *Midkiff* and the plethora of evidence submitted to the City Council, that the city condominium leasehold reform ordinance will have no effect upon a mythical oligopoly and the opposite effect on prices of condominiums. The price of leasehold condominiums (the alleged evil) will almost certainly drop, and the price of fee simple condominiums will almost certainly rise, just as occurred in the single-family residential market following *Midkiff*. It is both inconceivable and impossible that the city could seriously have believed otherwise. It is no longer plausible to claim that a land reform scheme modeled after the State Land Reform Act, as

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[2] *See* Nicholas Ordway, *Modeling Long Term Impacts of a Hypothetical Residential Condominium Lease on Lessors and Lessees in Hawaii* 7, 12 (1991).

[3] *See* Sumner La Croix & Louis Rose, *Does the Emperor Have Any Clothes? An Economic Analysis of Hawaii Land Reform and the Fifth Amendment* (Oct. 1993).

[4] *See* Hawai`i State Auditor and Locations, Inc., *Study of Resale of Leasehold Properties Converted to Fee Simple Ownership Under the Hawai`i Land Reform Act of 1967* 40 (1992); Ordway, *Modeling Long Term Impacts of a Hypothetical Residential Condominium Lease on Lessors and Lessees in Hawaii* 43; Department of Business and Economic Development, *The State of Hawaii Data Book 1987: A Statistical Abstract* 588 (1987); Department of Business and Economic Development, *The State of Hawaii Data Book 1990: A Statistical Abstract* 549 (1990).

proposed and enacted by Honolulu, can reasonably, conceivably, or possibly accomplish the stated public purposes. Such a claim is palpably without reasonable foundation. We therefore respectfully urge this Court to review such an egregious violation of its public purpose standards as set out in *Midkiff*, so as to place proper limits on public purpose declarations required by the Fifth Amendment.

D. City Ordinance 91-95 Results in an Unconstitutional Taking of Property Contrary to the Public Purpose Clause of the Fifth Amendment

In the words of Judge O'Scannlain:

> If the [public purpose] clause is to have any effect at all, it must mean that a court will not feign blindness when it sees through a patently transparent legislative recital that a taking is for a public use. When the government uses eminent domain to take real property from A and give it to B, with no meaningful impact on anyone else or on the community at large, the taking is purely private and should violate the Public Use Clause.

Richardson v. City and County of Honolulu, 124 F.3d 1150, 1168 (9th Cir. 1997) (O'Scannlain, J., concurring/dissenting). Regrettably, this is precisely what has occurred since *Midkiff*. Legislative bodies are taking from A and giving to B on the basis of transparently spurious recitals of public use, and courts are feigning blindness when confronted with challenges from landowners. This Court has made it abundantly clear that:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Dolan v. City of Tigard, 512 U.S. 374. Nor should the Public Purpose Clause be further "emasculated."[5]

While mindful of the distinction between regulatory takings and eminent domain, we nevertheless fear that the same "legislative creativity," against which this Court so forcefully inveighed in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), increasingly has permeated eminent domain cases as well. Courts uphold such transparent declarations of public purpose, citing *Midkiff* as their primary authority, relegating the Fifth Amendment's Public Purpose Clause not only to the status of a poor relation but, in some instances, kicking it out of the constitutional family altogether.

In *Roberts v. City of Worcester*, the city was permitted to acquire land based upon a recent urban renewal plan that entailed immediately conveying the land to new owners for purposes of a medical complex project. 635 N.E.2d 1365 (Mass. 1994). Citing *Midkiff*, the Massachusetts Judicial Court stated: "We need not resolve these contending positions because the defendants have the right in the circumstances to exercise the power of eminent domain. . . . Certainly, there is no valid basis to challenge the public purpose behind the proposed takings in this case." *Id.* at 1366; *see also Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Board of Lawrence*, 531 N.E.2d 1233 (1988).

In *New Jersey Housing and Mortgage Finance Agency v. Moses*, the trial court noted that the "condemnation involved the taking of property from one private owner and ultimately transferring it to another." 521 A.2d 1307, 1308 (N.J. 1987). The trial court held in favor of the landowner, because the intended use, a shopping center, would primarily serve a private corporation. *Id.* However, the appeals court reversed, because the statute provided for such a "support" facility and the "success

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[5] *See* 8A Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 26.04[2][iv] (Revised 3rd ed. 1997).

of the Legislature's primary goal of providing housing w[ould] obviously be hampered[.]" *Id.* at 1310.

In *City of Bellevue v. Painter*, the appeals court upheld the city's condemnation of land for a sedimentation pond even though it was outside of its boundaries. 795 P.2d 174 (Wash. App. 1990).

In *City of Oakland v. Oakland Raiders*, the Oakland Raiders, a successful National Football League franchise, attempted to move operations to Los Angeles; the City of Oakland attempted to enjoin this move through its eminent domain statute. 203 Cal. App. 3d 78, 80 (1988). Although the judgment of the appeals court favored the Raiders, it had no effect on the California Supreme Court's astounding earlier holding that condemning personal property such as a football franchise was no different from condemning land for a municipal football stadium. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840-41 (1982). As the chief justice observed in dissent: "It strikes me as dangerous and heavy-handed for the government to take over a business, including all of its intangible assets, for the sole purpose of preventing its relocation." 646 P.2d at 846 (Bird, C.J., concurring/ dissenting).

In *Laurence v. Stonewall*, the court upheld expanded condemnation for a sewage lagoon to include a boat launching ramp on the ground it served public recreational purposes. 503 So. 2d 260 (Miss. 1987).

In *Condemnation of .036 Acres, More or Less, of Land Owned by Wexford Plaza Associates*, the court upheld the condemnation of private land for a road to a private shopping center complex. 674 A.2d 1204 (Pa. 1996).

Finally, in *Dyer v. Texas Electric Service Co.*, the Texas Court of Appeals upheld as a public use the condemnation of land for a tap line, even though it was to serve only a single customer. 680 S.W.2d 883 (Tx. App. 1984).

Indeed, we have been hard pressed to find many cases decided in the last 14 years that have struck down an exercise of eminent domain on public purpose grounds, besides those decided on largely technical grounds.[6] *See Public Service Co. of Oklahoma v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okl. 1997) (finding that utility did not create a presumption of necessity of acquiring land for purchase merely by filing condemnation petition and utility was required to demonstrate public purpose and necessity existed). Those scant few that go beyond mere technicalities, however, subject local government public purpose declarations to the kind of scrutiny which this Court used in striking down local condemnations on public purpose grounds in *City of Cincinnati v. Vester*, 281 U.S. 439, and *Rindge v. Los Angeles*, 262 U.S. 700 (1923). We discuss these cases in the context of our burden-shifting argument in Section II below.

Therefore, we respectfully urge this Court to breathe life into the Public Purpose Clause of the Fifth Amendment and reject the alleged "public purpose" of Ordinance 91-95 as being palpably without reasonable foundation.

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[6] *City of Mesa v. Smith Company of Arizona, Inc.*, 816 P.2d 939 (Ariz. App. 1991) (holding statute listing purposes for which power of eminent domain may be exercised did not give city authority to condemn private land for cemetery expansion purposes); *County of De Kalb v. Smith*, 572 N.E.2d 379 (Ill. App. 1991) (holding that the county's statutory authority to maintain a courthouse, jail, and necessary county buildings did not impose an imperative duty to provide off-street parking and did not give the county authority to condemn property); *Olson v. Whitpain Township*, 595 A.2d 706 (Pa. 1991) (holding that a second class township did not have the authority to acquire property by condemnation for recreational purposes); *City of Tempe v. Fleming*, 815 P.2d 1 (Ariz. App. 1991) (holding that eminent domain cannot be used to abate a nuisance).

II

IT IS UNWARRANTED AND IMPROPER TO EXTEND TO LOCAL GOVERNMENT THE DEFERENTIAL STANDARD OF REVIEW WHICH THE COURT EXTENDED TO STATE LEGISLATURES IN *HAWAII HOUSING AUTHORITY v. MIDKIFF*

In *Midkiff*, this Court used an extremely deferential standard of review in upholding Hawaii's Land Reform Act. Of course, as was noted by Judge O'Scannlain in his separate opinion below, this Court uses a vastly less deferential standard of review in regulatory takings cases (as compared with eminent domain), at least since its opinions in *Nollan v. California Coastal Commission*, *Lucas v. South Carolina Coastal Council* and, most particularly, *Dolan v. City of Tigard*. It may very well be that a heightened standard of review is more necessary where, as in a police power regulation, a great risk arises that a taking may be initially uncompensated. Here, however, we address a different question: are there reasons to hold local governments--such as the City and County of Honolulu--to a more strict standard than a state in exercising legislative authority by condemning land? We think that there are.

A. Presumptions in Favor of State Legislatures Ought Not and Do Not Extend to City Councils

We begin with Justice Brennan's proposition that our governmental system "has no place for sovereign cities." *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 53 (1982). We accord our states and their legislatures substantial deference because this is a federal system with a national government created by the states, which are the ultimate repositories of sovereignty under our federal system.[7] Cities are mere creatures of the state, which states can create or abolish at will, absent heinous ulterior motives such as

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[7] *See* Daniel R. Mandelker, Dawn C. Netsch, Peter W. Salsich, & Judith W. Wegner, *State and Local Government in a Federal System* 10-37 (4th ed. 1996).

perpetuating racial segregation. *See Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Given this basic and fundamental distinction between state and local governments, there are a number of reasons why deference to state legislators and legislation should not be extended to local governments:

1. Local government politics is significantly different from state (and federal) politics, particularly with respect to territorality. The Federal Constitution protects nonresidents from discriminatory state legislation through such protections as the Commerce and Privileges and Immunities Clauses, but not from unfair burdens imposed by local government regulations.

2. There is a resultingly greater likelihood of majoritarian tyranny and minority exclusion at the local government level, particularly with respect to those guarantees of minority rights provided by the Bill of Rights. It should be a matter of grave constitutional concern when local governments reallocate property rights among private citizens. Here, Honolulu has taken the fee simple interests of landowners and transferred that land to condominium apartment owners, merely because such apartment owners allegedly cannot afford market rents for the land beneath their buildings. Such a taking is particularly egregious when, as here, no public funds are used to pay for the land taken, but rather the transfer is financed entirely with funds provided by the very private interests--the condominium apartment lessees--to which the private property of the landowners will be immediately transferred. Thus, what Dartmouth Economics Professor William Fischel describes as a "self-limiting" aspect of the public use doctrine, the "budget-preserving instincts of governmental agencies" which make

eminent domain "expensive" as well as "expansive"[8] is entirely lacking in this case. If this simple reallocation of property rights represents a valid public purpose, then the Public Purpose Clause is dead.

3. Moreover, a local government is more easily "captured" by various special interests, including antilandlord interests as occurred in Honolulu. The result, once again, is legislative discrimination against the many small landowners who own the land under condominium apartment buildings, in favor of the (by definition) vastly superior numbers of condominium apartment owners. It is against this form of majoritarian tyranny that the Bill of Rights, including the Fifth Amendment's Takings Clause and its public purpose requirement, is supposed to guard.

4. Local government is more revenue-driven than state and federal government, and the result is more distortion in the land policy arena. Here, Honolulu shifted its public financial burden of assisting private, individual condominium owners in purchasing their leasehold interests to private landowners.

In sum, there are cogent and compelling reasons why the presumption in favor of state legislative decisionmaking should shift when the decisionmaker is a city or county council. Courts are constitutionally required to protect fundamental rights, and as this Court stated in *Dolan*, the Fifth Amendment's Takings Clause is in the same category as the First and Fourth Amendments. The presumption should also shift when the political process malfunctions, in order to protect groups not

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[8] William A. Fischel, *Regulatory Takings: Law, Economics and Politics* 74 (Harv. U. Press, 1995).

protected by principles of fundamental rights or suspect classifications.[9]

B. This Court Has Twice Previously Used a Less Deferential Standard in Reviewing Local Government Declarations of Public Purpose in Eminent Domain Cases

In *City of Cincinnati v. Vester*, the City sought to condemn land in excess of that needed to widen a city street. 281 U.S. at 441. As the landowners claimed, the lower courts determined that "the sole purpose of the city was the recoupment by the resale of the properties in question of a large part of the expense of the street widening." *Id.* at 444. This Court held that this purpose violated the constitutional rights of the plaintiffs upon the ground that it "was not a taking for a public use 'within the meaning of that term.'" *Id.* This Court noted that, although "great respect" is given to "legislative declarations and in particular the judgments of state courts as to the uses considered to be public in light of local exigencies[,]" the question of what is a public use remains a judicial one. *Id.* at 446.

Earlier, in *Rindge Co. v. Los Angeles County*, although this Court recognized that a taking of property for a highway has been a taking for public use from time immemorial, it objected to a California Civil Code provision that rendered a legislative determination of public use conclusive, so long as there was a vote of two-thirds of its members. 262 U.S. at 702. In its thorough analysis of whether the highway in question was a public use, the Court affirmed the well-settled principle that the question of public use is a judicial one.

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[9] *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and the extensive and persuasive commentary on presumption-shifting in Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law. 1, 35-47 (Winter 1992).

Some state courts have followed this Court's lead in these two cases and specifically refused to apply the same deferential standard that this Court used in *Midkiff*. Thus, in *City of Center Line v. Chmelko*, 416 N.W.2d 401 (Mich. App. 1987), the Michigan Court of Appeals rejected a city public purpose declaration and held that the evidence demonstrated the taking was for the benefit of a private party. The city declared that the purpose for exercising its powers of eminent domain was to remove a blighted, deteriorating structure, to improve the tax base of the city, to stabilize the commercial district, and to remove a nonconforming use (under the local zoning ordinance). For that purpose, it would transfer the condemned land to a private developer "for commercial purposes in a manner that will improve the economic viability of the existing commercial district of the City, and that will improve and stabilize property values." 416 N.W.2d at 403.

Finding that the alleged public purpose was largely "a fiction," the Michigan court held that the "instant case is one in which 'heightened scrutiny' should apply [because] the record readily indicate[d] that the land, if condemned, would be made available to a private party." *Id.* In reaching this decision, the court expressly relied on the "line of Supreme Court cases" including the *Vester* and *Rindge* cases. Furthermore:

> We note that the cases upholding the deference given to legislative determinations involve a congressional decision or a state legislative determination upheld by a state court. However, in *Cincinnati v. Vester*, *supra*, the case most similar to our facts, the Court rejected a city resolution of public purpose. While concluding that legislative declarations of local factors was due great deference, the Court ruled that public use was ultimately a judicial question.

Chmelko, 416 N.W.2d at 405. In 1993, the Michigan Supreme Court struck down a condemnation of two properties that refused access to a licensed cable operator. In *City of Lansing v. Edward Rose Realty Inc.*, 502 N.W.2d 638 (Mich. 1993), the Court

applied a heightened scrutiny standard to the city's declaration of public purpose because the exercise of eminent domain would benefit another specific private interest. Once again citing this Court's opinion in *Vester*, the court held that "[m]ere statements that a proposed action furthers a public benefit are not conclusive." 502 N.W.2d at 642.

The judiciary's quintessential role of judicial review in these instances is further reflected in 2A Julius L. Sackman, *Nichols on Eminent Domain* § 7.08[2]; *See also Green v. High Ridge Association, Inc.*, 695 A.2d 125, 128-29 (Md. App. 1997) (finding that determination of public use is judicial); *City of Wheaton v. Sandberg*, 574 N.E.2d 697, 700-02 (App. Ill. 1991) (determining that court has a role of judicial review and holding ordinance vague and overbroad); *Denihan Enterprises, Inc. v. O'Dwyer*, 99 N.E.2d 235, 238-39 (N.Y. App. 1951) (holding that asserted public use was reviewable and that private use was primary--public benefit incidental); *Kessler v. City of Indianapolis*, 157 N.E. 547, 549 (Ind. 1927) (holding that evidence showed that real reason was to take private land for private purpose); *Fountain Park Co. v. Hensler*, 155 N.E. 465, 470 (Ind. 1927).

> [T]he question whether the constitutional provisions against the taking of property for private use have been violated is, like all constitutional questions, ultimately for the courts, and if a court can clearly see that a particular undertaking of eminent domain has no real and substantial relation to the public use, it is the duty of the court to intervene.

Id. Although courts traditionally give deference to legislative bodies, "the propriety of the taking is ultimately a judicial question . . . ."[10]

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[10] 7 Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 2.07[3].

CONCLUSION

We therefore respectfully urge this Court to review this case and to affirm that the burden of proof should be shifted and a less deferential standard applied to local declarations of public purpose. We also respectfully urge this Court to find that, as a result of such an affirmation and application of such a standard, Honolulu clearly violated the Public Purpose Clause of the Fifth Amendment in using its powers of eminent domain to take land from one group of landowners and transfer it to another larger group in the name of land reform.

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Respectfully submitted,

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